similarly contained the name of the plaintiff as the lender.

As the trial judge based his decision merely on his finding that the plaintiff was not the lender, with which finding I do not agree, the appeal must be allowed.

It is also contended by counsel for the plaintiff that the old Moneylenders Ordinance (Cap. 193) having been repealed by the Moneylenders Ordinance, 1959, the defendant could not rely on section 5 of the repealed Ordinance. Counsel relied on the common law principle that the effect of a repeal of an Act of Parliament is that the Act repealed is treated as *ab initio* non-existent and that accordingly, unless the defendant had any rights which by virtue of the provisions of section 14(c) of the Interpretation and General Clauses Ordinance (Cap. 2) were unaffected by the repeal of the old Ordinance, the plaintiff was entitled to judgment on his claim notwithstanding that he had not complied with the provisions of section 5 of the old Ordinance. The argument put forward was that section 5 of the old Ordinance merely rendered unenforceable any money lending contract unless the requirements of that section had been complied with by the lender. That section therefore merely gave the borrower a right to defend any claim by his lender for repayment of money lent to him and was not an "accrued" or "acquired" right within the meaning of section 14(c) of the Interpretation and General Clauses Ordinance. It is counsel's contention that the right given to a defendant by that section did not become an accrued right until an action had been commenced against him by his lender. This being so, it is contended that, there being no saving clause in the Moneylenders Ordinance, 1959, preserving this mere right, the effect of the total repeal of the old Ordinance was that that right vanished together with the old Ordinance and was no longer available to a borrower.

As my view on the main issue of fact, namely, that the plaintiff was in fact the lender, is decisive of this appeal, I do not think it desirable for me to express any final view in regard to this contention especially as the defendant was not represented at the appeal. It would seem, however, without coming to a final conclusion on this point, that on principle and on the authority of the cases cited to me, this contention is well-founded. It may, however, be unnecessary for this state of uncertainty to remain. Looking at the Moneylenders Ordinance, 1959, as a whole it is plain that the intention of the legislature was not to deprive a person who had borrowed money from a moneylender from being able, in the case where the moneylender had ceased to carry on business after the coming into force of this Ordinance, of the right in a suitable case to avail himself of a defence based on section 5 of the old Ordinance. This being so, I apprehend that the necessary action will no doubt be taken quickly by the legislature to remedy what may be a defect in the present Ordinance.

The appeal is accordingly allowed and judgment will be entered for the plaintiff for $774 and costs on the District Court scale. Counsel for the plaintiff has intimated that in the event of this appeal succeeding he would not ask for the costs of the appeal. There will be therefore no order as to the costs of this appeal.

Appeal allowed.

Solicitors: *Braddell Bros.*

LEONG CHEONG KWENG MINES LTD. v. KOK HOONG

[C.A. (Thomson C.J., Hill and Good JJ.A.) March 6, 1962]

[K.L. — F.M. Civil Appeal No. 33 of 1961]

Estoppel — Agreement to hire machinery — Successful judgment on a claim to arrears of rent due — No defence to claim filed by defendant — Second action for arrears of rent due covering a subsequent period — Defences raised under the Moneylenders Ordinance, 1951 and Bills of Sale Enactment (Cap. 57) — Whether defendant estopped from averring facts on which they wish to found their defences — Distinction between res judicata and estoppel "by matter of record" — Nature of estoppel "by matter of record."

Evidence Ordinance, 1950, s.115 — Distinction between "estoppel" and "res judicata".

The Court of Appeal reversing the decision of Ong J. in *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*, p. 35, *supra*, held:

Held: the question to be decided which was in its essence one of estoppel and not one of *res judicata* was whether the defendants not having set up the defences under the Moneylenders Ordinance and the Bills of Sale Enactment in the first action were estopped in the second action from averring the facts in which they wished to found these defences. When a plaintiff in an action makes averments relevant to his action which are not denied, the defendant is estopped in any subsequent proceedings from denying these averments or averring facts inconsistent with them. No such estoppel however arises from an omission in the previous proceedings to plead facts which are not inconsistent with those pleaded by the plaintiff and which go to support a defence by way of confession and avoidance or a special plea in law. The defendants are not estopped from averring that the plaintiff is a moneylender or any of the other facts on which they seek to base their defences under the Moneylenders Ordinance or the Bills of Sale Enactment.

Cases referred to:—

(1) *In re A Bankruptcy Notice* [1924] 2 Ch. 76, 97.
(2) *Griffiths* v. *Davies* [1943] 2 All E.R. 209, 212.
(3) *Munni Bibi* v. *Tirloki Nath* 58 I.A. 158, 165.
(4) *Sarat Chunder Dey* v. *Gopal Chunder Laha* 19 I.A. 203, 215.
(5) *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.* [1938] A.C. 287, 304.
(6) *Duchess of Kingston's case* 2 Smith's L.C. (13 Edn.) 644, 657.
(7) *Ord* v. *Ord* [1923] 2 K.B. 432.
(8) *Robinson* v. *Robinson* [1943] P. 43, 44.
(9) *Howlett* v. *Tarte* 10 C.B. (N.S.) 813.
(10) *Humphries* v. *Humphries* [1910] 2 K.B. 531.
(11) *Leaf* v. *Tuton* 10 M. & W. 393.
(12) *Cooke* v. *Rickman* [1911] 2 K.B. 1125.
(13) *Hoystead* v. *Commissioner of Taxation* [1926] A.C. 155.

(14) *Society of Medical Officers of Health* v. *Hope* [1960] A.C. 551.
(15) *New Brunswick Railway Co.* v. *British & French Trust Corporation Ltd.* [1939] A.C. 1.
(16) *Sithambaram Chettiar* v. *Chong Fatt* [1939] M.L.J. 298; [1938] F.M.S.L.R. 140.
(17) *In Re South American and Mexican Company* [1895] 1 Ch. 37.
(18) *Irish Land Commission* v. *Ryan* [1900] 2 I.R. 565, 574.
(19) *Cohen* v. *Jonesco* 42 T.L.R. 41.

COURT OF APPEAL.

N. A. Marjoribanks for the appellants.

R. Ramani (*T. K. Sen* with him) for the respondent.

Cur. Adv. Vult.

Thomson C.J.: The plaintiff in this case is a landowner residing in Kuala Lumpur and the defendants are a limited liability company carrying on the business of mining.

On 20th June, 1952, the parties executed an agreement in writing. That agreement purported to be for the hiring by the plaintiff to the defendants of certain specified items of mining machinery. The hiring was to be for a period of twelve months. Rent was payable at the rate of $2,500 a month payable monthly in arrear and there was provision for the payment of interest on rent not paid on the due date. There was provision for the owner to retake possession of the machinery in the event of non-payment of rent or breach of other provisions of the agreement.

On 30th June, 1954, the plaintiff commenced proceedings against the defendants in Civil Suit No. 272 of 1954. The plaint related that the plaintiff was a landowner and that by the agreement of 20th June, 1952, he had let certain machinery on hire to the defendants for a term of twelve months at a rent of $2,500 a month. That agreement had been continued after the expiration of twelve months and there was now owing under it a sum of about $23,400 for arrears of rent and interest thereon which sum was claimed.

These proceedings were commenced by a plaint marked "SUMMARY PROCEDURE" issued under section 459 of the Civil Procedure Code which was then in force. The defendants made no attempt to obtain leave to defend and on 3rd November, 1954, judgment was entered in favour of the plaintiff in terms of the prayer in the plaint for $23,400 and interest from the date of judgment and costs.

On 15th May, 1956, the plaintiff commenced another suit (No. 178 of 1956) against the defendants. The plaint was issued under the Civil Procedure Code which was still in force (it remained in force until 31st March, 1958) but was not marked "SUMMARY PROCEDURE". In it the plaintiff referred to the written agreement of 20th June, 1952. He went on to aver that on the expiration of the period of twelve months for which that agreement endured the defendants continued hiring the machinery on the terms and conditions set out in the agreement. In May, 1955, by arrangement with the defendants the plaintiff took back two items of the machinery and the parties came to a fresh agreement, apparently oral, by which the hiring of the remaining machinery was to continue on the terms and conditions of the agreement of 20th June, 1952, subject to certain variations, the only one of these which is of importance being that the rent should be $2,000 instead of $2,500 a month. The rent was not paid and on 25th November, 1955, the plaintiff determined the hiring as from 19th December and demanded the return of the machinery and the amount of rent owing. The defendants failed to comply and accordingly the plaintiff sued for arrears of rent and an order for possession of the machinery.

The defendants filed a defence which alleged *inter alia* that the plaintiff was at all material times a moneylender. In brief, it was said that the agreement of 20th June, 1952, the execution of which was admitted, did not by itself represent the true arrangement made at that time between the parties. It was to be read with another agreement of the same date whereby the defendants purported to sell the machinery in question to the plaintiff. The two agreements were to be read together and formed part of a transaction whose object was to make the machinery security for a loan and the agreement of 20th June was in effect a bill of sale which, not being in the statutory form and not being registered under the Bills of Sale Enactment, was void. The alleged charges for hire were in truth charges for interest on money lent and the agreement being nothing more than part of a security connected with a moneylending transaction was void by reason of the provisions of the Moneylenders Ordinance, 1951, and was also void as an unregistered bill of sale.

In his reply the plaintiff said that the defendants were estopped by the judgment of 3rd November, 1954, in Civil Suit No. 272 of 1954, from contending either that the plaintiff was a moneylender or that the transaction in question was a moneylending transaction or that the agreement of 20th June, 1952, was other than what it purported to be or that it was void.

By an order dated 28th July, 1961, it was ordered by consent that the question of estoppel should be heard and disposed of as a preliminary point of law prior to trial in accordance with rule 2 of Order 25.

In due course the matter came for decision before Ong J. who held that there was an estoppel. That decision was embodied in the following order dated 6th September, 1961:—

"This Court doth declare that the defendant is estopped by judgment dated the 3rd day of November, 1954 in Kuala Lumpur High Court Civil Suit No. 272 of 1954 between the plaintiff and the defendant from contending in this action that the plaintiff is a moneylender or that the transaction in question in the pleadings mentioned was a moneylending transaction or is void or unenforceable under the Moneylenders Ordinance, 1951 or otherwise or that the documents in the pleadings mentioned are other than what they purport to be or that they or either of them are or is a bill of sale or void

or unenforceable under the Bills of Sale Enactment or otherwise."

Against that decision the defendants have now appealed.

Before proceeding further I think I should say that whatever Ong J. decided, the terms of the order that has been quoted are clearly wrong. The Moneylenders Ordinance and the Bills of Sale Enactment are statutes intended to effect certain matters of public policy and as was said by Atkin L.J. (as he then was) in the case of *In re A Bankruptcy Notice* [1]:—

> "It seems to me well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid."

And as was said by Lord Greene M.R. in the case of *Griffiths* v. *Davies* [2] "the proposition that, where there is a statutory prohibition or direction, it cannot be overridden or defeated by a previous judgment between the parties" is "a principle which is manifestly right, quite apart from authority". In the present case there may or may not be an estoppel against pleading facts which will afford a basis for invoking the statutes in question, but that is a different question; there can be no bar to pleading the statutes themselves.

Ong J. said that the question for determination by him was:—

> "Whether the principle of estoppel *per rem judicatam* applies so that the defendant, against whom a default judgment had previously been entered for a sum alleged to be arrears of rent of machinery hired to him by the plaintiff as owner, is debarred in a subsequent action on the same hiring agreement from disputing the validity of the agreement and the plaintiff's claim for return of the machinery and further arrears of rent accrued since the previous judgment."

With the greatest respect I think that statement of the question for determination is not quite correct.

In the first place, according to the pleadings, there were three agreements between the parties. First, there was the alleged hiring agreement of 20th June, 1952, which was for a period of twelve months. Then, some time in 1953, there was a second agreement, apparently oral, by which the alleged hiring was continued, apparently indefinitely, on the same terms as those set out in the written agreement of 20th June, 1952. Finally, in May 1955, there was a third agreement which, again, was apparently oral. This purported to be for the hiring of some, but not all, of the chattels mentioned in the 1952 agreement on conditions that were substantially the same as and were stated by reference to the 1952 agreement.

The first action between the parties, that was Civil Suit No. 272 of 1954, was on the second of these agreements. The present action is on the third agreement and that is not the same agreement as the second one.

In the second place the question postulated is framed in much too wide terms.

It would have been an available defence in the first action to plead that it was the defendants who were in truth the owners of the chattels, that the 1952 agreement was to be read with another agreement between the parties whereby the defendants purported to sell the chattels to the plaintiff and that the whole transaction was in reality a moneylending transaction in which the chattels in question were the security and that the plaintiff was a moneylender. On these facts (if they had been made out) it could have been argued that by reason of the Moneylenders Ordinance and the Bills of Sale Enactment, the plaintiff could not recover not only on the first agreement on which he did not sue but also on the second agreement which was the one on which he sued.

Similarly, if the defendants are allowed to plead the same facts in the present case then if these facts are made out and in the absence of anything relevant having occurred between the first and third agreements it will be open to the defendants to contend that the plaintiff is unable to recover on the third agreement, that is to say, the oral agreement made in 1955.

Thus the real question to be decided was not the question posed in wide terms by the trial judge but the much narrower question of whether the defendants, not having set up the defences based on the Moneylenders Ordinance and the Bills of Sale Enactment in the first action, are estopped in the second action from averring the facts on which they wish to found these defences. This distinction is not merely dialectical and superficial, on the authorities it is one which goes to the root of the matter.

At this point I would emphasise that the question is in its essence one of estoppel and not one of *res judicata*. Generally speaking, *res judicata* is a matter of procedure while estoppel is a matter of evidence. The dichotomy, of course, is not complete in the logical sense. *Res judicata*, a thing which has been adjudged, may in certain circumstances give rise to an estoppel. Nevertheless, it is of the utmost importance to observe the distinction between the rule of *res judicata* in the strict sense and estoppel "by matter of record", to use the much-quoted phrase of Coke.

Res judicata in the strict sense arises where a matter has been litigated between parties and litigated to a final decision. That decision cannot be questioned and the matters decided cannot be re-opened. Where it relates to a debt the debt ceases to exist and becomes merged in the judgment. It is a principle based on the old jurisprudential maxim that no one should be troubled twice for the same cause. It is this rule which is embodied in section 11 of the Indian Code of Civil Procedure and was embodied in section 6 of our own Civil Procedure Code until it was repealed in 1958, though, as was pointed out in the case of *Munni Bibi* v. *Tirloki Nath* [3], that statement of the rule has been held by the Privy Council on many occasions not to be exhaustive.

Estoppel, on the other hand, is fundamentally a matter of evidence. It is something which in certain circumstances makes certain evidence inadmissible. In this country its statutory basis is to be found in section 115 of the Evidence Ordinance. That section is the same as section 115 of the Indian Evidence Act and in *Sarat Chunder Dey* v. *Gopal Chunder Laha* [4] the Privy Council expressed the view that the terms of the Indian Act did not enact as law in India anything different from the law in England, a view which was reiterated forty-five years later by their Lordships in the case of *Mercantile Bank of India, Ltd.* v. *Central Bank of India, Ltd.* [5].

Here it is of importance to observe that estoppel arises from admission. As is said in the following passage from the commentary on the *Duchess of Kingston's case in Smith's Leading Cases* [6]:—

> "*Interest reipublicae ut sit finis litium* — but, if matters which have been once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion. It is wise, therefore, to provide certain means by which a man may be concluded, not from saying the truth, but from saying that that which, by the intervention of himself or his, has once become accredited for truth, is false."

The author then goes on to say, in a passage quoted by Lush J. in the case of *Ord* v. *Ord* [7]:—

> "An estoppel, therefore, is an *admission*, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature — so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it."

Now, what we are concerned with in the present case is the particular sort of estoppel that arises from previous litigation between the same parties, "estoppel by record", the circumstances in which previous litigation gives rise to admissions evidence to controvert which is inadmissible.

Any inquiry into this subject must inevitably commence from the following well-known passage from the judgment of De Grey C.J. almost two hundred years ago in the *Duchess of Kingston's case, supra*:—

> "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

Much the same thing was said by Henn Collins J. in the case of *Robinson* v. *Robinson* [8]. The phrase "*res judicata*", he said:—

> "is used to include two separate states of things. One is where a judgment has been pronounced between parties and findings of fact are involved as a basis for that judgment. All the parties affected by the judgment are then precluded from disputing those facts, as facts, in any subsequent litigation between them. The other aspect of the term arises where a party seeks to set up facts which, if they had been set up in the first suit, would or might have affected the decision."

The same distinction was observed by Lush J. in the case of *Ord* v. *Ord, supra*:—

> "The words '*res judicata*' explain themselves. If the *res* — the thing actually and directly in dispute — has been already adjudicated upon, of course by a competent Court, it cannot be litigated again. There is a wider principle ..... often treated as covered by the plea of *res judicata*, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings and which he chose not to put forward."

Each of these statements contains two different parts and there can be no question of the present case coming within the first part of any of them. No Court has ever decided that the plaintiff is or is not a moneylender and so forth. The question is whether the present case comes within the second part of the statements. It is whether the plaintiff being a moneylender and so forth were matters more in point in the first action than being "incidentally cognisable", or were "facts which, if they had been set up in the first suit, would or might have affected the decision" or are "defences which the defendant had an opportunity of putting before the Court and which he chose not to put forward". Were the issue an entirely philosophical one and were it entirely at large the answer to these questions might at first sight be favourable to the defendant. The issue, however, is to be considered within the framework of our forensic scheme of things and subject to the limits within which the law expects litigants to act as philosophic men and the extent to which they can reasonably be subjected to the principle that silence involves assent. In other words, the answer is to be found in authority, not in reflection.

Proceeding to consider the authorities, the first case that must be mentioned is the well-known case of *Howlett* v. *Tarte* [9] which, somewhat curiously, does not seem to have been cited before Ong J.

The plaintiff in that case had previously sued the defendant for rent due under a building agreement and the defendant had unsuccessfully attempted to plead payment into court of a smaller sum and non-performance by the plaintiff of a condition in the agreement. In later proceedings for rent for a subsequent period the defendant pleaded that the original agreement had been replaced by a tenancy from year to year which had been terminated by notice. The plaintiff argued that the defendant was estopped from setting up this defence by his omission to plead it in the first action. That argument was rejected. Williams J. said (p. 826):—

> "I think it is quite plain that there is no authority expressly in point to sustain the doctrine..... .....that, if there had been a previous action between the same parties founded upon the same contract, and the defendant had suffered judgment by default in that action, he is precluded from setting up

in a subsequent action any defence which he could have pleaded in bar to the former, notwithstanding the defence is in confession and avoidance of the agreement which is the foundation for the action. I think it is quite clear upon the authorities to which our attention has been called, and upon principle, that, if the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel. But the defence set up here is quite consistent with every allegation in the former action. The plea admits the agreement, but shews by matter *ex post facto* that it is not binding upon the defendant."

Willes J. agreed and went on to say:—

"The alleged estoppel here comes within the exception stated in the note to *The Duchess of Kingston's case*, viz. 'where the thing averred is consistent with the record.' The defence is good, if true. It is quite consistent with the allegations on the record in the former action that this new matter is true. The defendant omitted to set it up on the former occasion: and the question is, whether, by allowing judgment to go by default, he is estopped as to that matter in every subsequent action at the suit of the plaintiff. It is an entirely novel proposition."

.....

"It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action."

Byles J. agreed there was no estoppel but based himself on somewhat different grounds:—

"It was hard enough, in actions at common law, where the defendant could only plead one plea: but, to extend the rule to the case of an allegation not upon the record would increase the hardship tenfold. Suppose an action of covenant: the defendant had two defences,— performance and release: he could not plead both: he elected to plead performance. Suppose that plea found against him. He could not in a subsequent action plead *non est factum*. But, what authority is there for saying that he could not plead the release."

In the case of *Humphries* v. *Humphries* [10] it was held that the defendant who had not raised a defence of non-compliance with the Statute of Frauds in a previous action for arrears of rent was estopped from raising it in another action in respect of subsequent arrears of rent under the same lease. Farwell L.J. quoted (p. 534) the following portion of the judgment of Williams J. in *Howlett* v. *Tarte* (which has already been quoted here):—

"If the defendant" (to a second action) "attempted to put on record a plea which was inconsistent with any traversable allegation in the former declaration" (i.e., in the first action) "there would be an estoppel".

He then went on to point out on the authority of *Leaf* v. *Tuton* [11] that a plea of the Statute of Frauds was demurrable under the old law, the general issue being "itself a denial that the requisites of the Statute of Frauds had been complied with" and that the "abolition of demurrers is a mere matter of pleading which does not affect the principle". He continued (p. 535):—

"The rule laid down in *Howlett* v. *Tarte* is confined to allegations which the defendant could have traversed, and does not extend to pleas which confessed and avoided, or to matters which were not raisable by traverse but by special plea, necessitating proof on the part of the defendant, such as fraud, gaming, release, or infancy, allegations which do not amount to denial, but to confession and avoidance of the contract."

Here the reference to the "rule laid down in *Howlett* v. *Tarte*" is a reference to the statement from the judgment of Williams J. already quoted, that is the statement that there is an estoppel against setting up in a second action a plea inconsistent with a traversable allegation in a former action, and the reference to fraud and gaming and so forth makes it clear that his Lordship did not regard failure to set up a plea which was not a traverse as creating any estoppel. Later, the point was put in different words (p. 536):—

"Estoppel is merely a rule of evidence, and if the plaintiff can object to the reception of evidence on a particular fact because it is an issue which was properly raised by him and was or could have been traversed by the defendant in a former action, and has been determined in the plaintiff's favour in such action, there is no reason for disallowing the objection; but if there was no such definite issue, then the objection will fail."

In other words, the converse of the rule is a correct statement of the law though not directly to be deduced from it in terms of formal logic.

Similar views were expressed the following year in the case of *Cooke* v. *Rickman* [12] where it was held that a defendant was estopped from setting up a defence of no consideration which she could have set up but did not set up in a previous action. Bray J. quoted the passage from the judgment of Farwell L.J. in *Humphries* v. *Humphries* which has already been quoted regarding "the rule laid down in *Howlett* v. *Tarte*" and went on to say (p. 1129):—

"The effect of the decision in *Humphries* v. *Humphries* is that it is only in the special circumstances mentioned in the judgment that the exception to the rule of estoppel prevails. .....

.....

Humphries v. *Humphries* shews that to avoid the estoppel the matter must be such as requires a special plea or a plea necessitating proof by the defendant."

In the case of *Hoystead* v. *Commissioner of Taxation* [13] the subject matter was a tax assessment in Australia and the question was whether the Australian Commissioner of Taxation was estopped by a decision of his own regarding a previous assessment. In the course of his speech Lord Shaw expressed the view that the *ratio decidendi* of *Howlett* v. *Tarte* was to be found in the strictness of the rules of pleading in force prior to 1873. Later, however, he quoted the passage from the judgment of Williams J. where it is said: "If the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation ..... there would be an estoppel" which passage he said had "been accepted expressly over and over again, as for instance ..... in *Humphries* v. *Humphries*". He went on (p. 171):—

"It must, however, be pointed out that *Carter* v. *James* and *Howlett* v. *Tarte* turned upon default in pleading in the prior proceedings, relied upon as an estoppel; but in a case like the present, where there are no pleadings at all, the main question is whether a prior opportunity of raising the point now foreclosed by estoppel had in substance arisen and been passed by. In short, the present point was one which, if taken, went to the root of the matter on the prior occasion, so that its

omission was no mere default in pleading but a real attempt to divide one argument into two and to multiply litigation."

That case has been discussed in the recent case of *Society of Medical Officers of Health* v. *Hope* (14) where Lord Radcliffe said that Lord Shaw's opinion was:—

"devoted to considering with weight and learning, and ultimately to rejecting, the proposition .... that there could be no estoppel because the legal point which had been the subject of the High Court's decision had been conceded by admission and did not therefore embody the court's own direct judgment."

He went on to say (p. 566):—

"The case stands as an authoritative contribution to the rule that in matters of estoppel what might have been said may be as important as what was actually said, and that, as between the parties themselves, law may indeed be formed *sub silentio*."

Hoystead's case is, of course, binding on this court. There were, however, as has been seen, no pleadings in the original proceedings with which it was concerned, and the point involved was essentially one of law and not of fact. For myself I cannot find anything in it of binding authority in relation to a case where there are pleadings and there has been no omission to traverse any traversable averment. Indeed in his statement of what their Lordships regarded as settled Lord Shaw concluded (at p. 166):—

"The same principle — namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

The last of the English cases which I would mention is the case of *New Brunswick Railway Company* v. *British and French Trust Corporation, Limited* (15). There Lord Maugham L.C. referred to a passage in the judgment of Willes J. in *Howlett* v. *Tarte, supra*, which has already been quoted. He said he thought that there was much to be urged in favour of it "though it may have been a little too widely expressed". He went on to say (at p. 21):—

"In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment; in other words, by the *res judicata* in the accurate sense."

Lord Wright also dealt with the case of *Howlett* v. *Tarte, supra*. What he said was this (at p. 37):—

"That decision has been explained as depending on the old system of pleading. But I think it depends on wider principles. *I think it implies that default is not to be treated as an admission.** Willes J. said that the plea in the second action, which was by way of confession and avoidance, was consistent with the record. He said that the objection was a new device, which he thought should not be introduced. 'Nobody,' he added, 'ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action'. It is enough for present purposes to treat this observation as limited to a case where judgment has gone by default, whether of appearance or pleading. In that sense I should accept these observations of Willes J. one of the greatest Common Law Judges. There are grave reasons of convenience why a party should not be held to be bound by every matter of fact or law fundamental to the default judgment. It is, I think, too artificial to treat the party in default as bound by every such matter as if by admission. All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides. I should regard any further effect in the way of estoppel as an illegitimate extension of the doctrine, which in the absence of express authority I am not prepared to accept."

* The italics are mine.

Finally, there is the local case of *Sithambaram Chettiar* v. *Chong Fatt* (16). In that case the plaintiff applied by way of originating summons for the sale of certain charged property and in these proceedings the defendant was served but did not appear. The land was sold in consequence. In a subsequent suit by the plaintiff for the balance due under the charge the defendant pleaded that he did not execute the charge or alternatively that at the date of its execution he was an infant. It was objected for the plaintiff that the defendant was estopped from raising these defences by reason of the judgment in the originating summons. Murray-Aynsley J. held there was an estoppel which prevented the defendant pleading that he did not execute the charge but that there was no estoppel in the case of the defence of infancy. What he said was this (at p. 299):—

"The leading case on the subject is *Howlett* v. *Tarte*. In the case of *Hoystead* v. *Taxation Commissioner*, its origin of the rule was explained but it actually had no application to that case and it still holds good. In applying the rule to the present case one would arrive at the following result (actually there were no pleadings but it is necessary to consider what the plaintiff would have to allege if he had had a pleading). The defendant is estopped from alleging facts in supporting a plea of *non est factum* but not from alleging infancy which would have been a matter of confession and avoidance."

There would thus seem to be ample authority for the proposition that when a plaintiff in an action makes averments relevant to his action which are not denied the defendant is estopped in any subsequent proceedings from denying these averments or averring facts inconsistent with them. No such estoppel, however. arises from an omission in the previous proceedings to plead facts which are not inconsistent with those pleaded by the plaintiff and which go to support a defence by way of confession and avoidance or a special plea in law.

As it is put in *Smith's Leading Cases* (13th Edn.) Volume II, p. 679:—

"The omission by a defendant to set up a defence in an earlier action does not estop him from setting it up in a later action brought by the same plaintiff, provided that such defence is not inconsistent with any traversable averment made by the plaintiff in the earlier action. .... If, however, the defendant to a second action attempts to set up a defence which is inconsistent with any traversable allegation in the earlier action there is an estoppel."

Having arrived at that result I do not think any of the other points raised in argument call

for discussion. Out of regard, however, for the carefully reasoned judgment of the learned trial judge I should mention a *dictum* of Vaughan Williams J. in the case of *In re South American and Mexican Company* (17) and certain general observations made by Lord Herschell in the Court of Appeal in the same case. The point can perhaps be best dealt with by quoting the following passage from the judgment of Fitz-Gibbon L.J. in the Irish case of *Irish Land Commission* v. *Ryan* (18) :—

"The only suggestion of estoppel by a judgment by default which I can find in the books is in a *dictum* of Vaughan Williams J. in the *South American and Mexican Company's Case*. He was dealing with a judgment *by consent*, but he says: 'It has always been the law that a judgment by consent, *or by default*, raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter.' He cites no authority for this proposition, and I can find none. The Judges in the Court of Appeal do not refer to a judgment by default, and it is curious that Vaughan Williams J. himself, in the immediately preceding sentence, gives a reason which does not apply to such a judgment, for he says: 'The basis of the estoppel is that *when parties have once litigated a matter* it is in the interest of the estate that litigation should come to an end, and *if they agree* upon a result or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end'."

If they had been speaking in 1961 and not in 1895 and 1900 it may well be that both Vaughan Williams J. and FitzGibbon L.J. would have expressed themselves in rather more qualified terms. Be that as it may, it is clear that what the former said in relation to judgments by default must be regarded as *obiter*. In any event, the statement goes no further than saying that a judgment by default stands on no different footing than any other judgment from the point of view of the matter regarding which and the circumstances in which it gives rise to estoppels.

Returning to the present case, the application of the principle which has been stated is abundantly clear. The strict rule of *res judicata* prevents the defendants from denying that on 3rd November, 1954, which is the date of the judgment in Civil Suit No. 272 of 1954, they owed the plaintiff $23,400, which is the amount of the judgment in that case. The antecedent debt became merged in the judgment debt and that is irrespective of any question of it being a debt connected with a moneylending transaction (see *Cohen* v. *Jonesco* (19)). Again, there is an estoppel which prevents the defendants from denying that they executed the agreement of 20th June, 1952, and indeed they are estopped from denying any other averment of fact contained in the plaint in Civil Suit No. 272 of 1954. In my view, however, they are not estopped from averring that the plaintiff is a moneylender or any of the other facts on which they seek to base their defences under the Moneylenders Ordinance or the Bills of Sale Enactment. Whether or not these defences will succeed is, of course, an entirely different matter.

In all the circumstances, then, I would allow the appeal with costs and set aside the Order of the High Court dated 6th September, 1961. The defendants should have the costs of the demurrer proceedings in any event.

Hill J.A.: I have read the judgment of the learned Chief Justice with which I respectfully agree and to which I have nothing to add.

Good J.A.: I have had the benefit of reading the judgment of the learned Chief Justice, with which I agree, and I have nothing to add to it.

Appeal allowed.

Solicitors: *Lovelace & Hastings; T. K. Sen & Co.*

MOHAMED ALI v. PUBLIC PROSECUTOR

[A. Cr. J. (Ong J.) March 6, 1962]

[K.L. — Criminal Appeal No. 6 of 1962]

Penal Code, s.323 — Parties injured during scuffle — Pattern of conduct of a reasonable man — Real test to be applied.

Evidence Ordinance, 1950, ss.114, 157 — Veracity of witness doubtful — Whether should be scrutinised with care — Inaccurate account of injuries — Whether it reflects upon credit of witness — Admissibility of evidence — Presumptions of fact.

In a prosecution under section 323 of the Penal Code, once the veracity of a witness has been shown to be doubtful, the whole of his evidence must be scrutinised with care. However an inaccurate account by the witness of the injuries received during the confusion of a scuffle does not in any way reflect upon the credit of the witness and failure to produce a police report justified no inference of guilt of an accused person by the application of section 114(g) of the Evidence Ordinance.

The pattern of conduct of a reasonable man is not the test to be applied in these cases, the real question is, whether or not, in the circumstances, the complainant did behave unreasonably.

Observations on sections 157 and 114 of the Evidence Ordinance, 1950.

Cases referred to:—

(1) *R.* v. *Whitehead* [1929] 1 K.B. 99, 102.
(2) *Lam Choon & Co.* v. *Lim Yam Hong & Co.* [1931] S.S.L.R. 96; A.I.R. 1928, P.C. 127, 128.
(3) *R.* v. *Baskerville* [1916] 2 K.B. 658.
(4) *Berry* v. *British Transport Commission* [1961] 3 W.L.R. 450, 463.
(5) *Baxendale* v. *Bennett* (1878) 3 Q.B.D. 525, 529, C.A.
(6) *Public Prosecutor* v. *Idris* [1955] M.L.J. 234, 235.

CRIMINAL APPEAL.

P. J. Mooney for the appellant.

Harun Hashim (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ong J.: The appellant was convicted in the Magistrate's Court at Kuala Lumpur, upon a charge of voluntarily causing hurt in contravention of section 323 of the Penal Code, and was bound over to be of good behaviour for one year, under section 173A of the Criminal Procedure Code. He appeals against such conviction.